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MICHAEL RÖDAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1686

LEO SHEEP COMPANY AND
PALM LIVESTOCK COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, AND
DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF OF PETITIONERS

CLYDE O. MARTZ
HOWARD L. BOIGON
DAVIS, GRAHAM AND STUBBS
2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202

JOHN A. MACPHERSON
T. MICHAEL GOLDEN
MACPHERSON, GOLDEN AND BROWN
First Wyoming Bank Building
P.O. Box 999
Rawlins, Wyoming 82301

Attorneys for Petitioners

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States District Court for the District of Wyoming has not been officially reported and is reproduced in Appendix A to the petition for writ of certiorari filed by petitioners herein. The opinions of the United States Court of Appeals for the Tenth Circuit are reported at 570 F.2d 881, 890, and are reproduced in Appendix B to the petition for writ of certiorari.

JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1). The judgment and opinion of the Court of Appeals were entered on May 17, 1977, and the order and supplemental opinion of that court denying rehearing were entered on February 28, 1978. The petition for writ of certiorari was filed on May 26, 1978 and was granted on October 2, 1978.

STATUTES INVOLVED

The statutes involved are the Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492, *as amended*, Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358 (hereinafter referred to as the "Union Pacific Act"), and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-65 (hereinafter referred to as the "Unlawful Inclosures Act"), which are reproduced in Appendix C to the petition for writ of certiorari.

QUESTION PRESENTED

Whether Congress reserved any right of way across odd-numbered sections of land granted in fee to the railroad companies and their assigns pursuant to the Union Pacific Act.

STATEMENT OF THE CASE

On July 1, 1862, Congress enacted the Union Pacific Act providing for federal subsidization of construction of a railroad from the Missouri River to the Pacific Ocean. See *United States v. Union P.R.R.*, 91 U.S. 72 (1875); P.

Gates, *History of Public Land Law Development* 362-65 (1968) (hereinafter cited as "Gates"). The Act chartered The Union Pacific Railroad Company and granted it both a 400-foot right of way through the public lands and ten (expanded to twenty by the 1864 amendment) odd-numbered sections of land for each mile of railroad the company constructed from Omaha, Nebraska, to the western border of Nevada, subject only to certain vested rights of third parties and to a reservation of mineral lands by the United States. Act of July 1, 1862, §§ 1-3, 12 Stat. 489-92, *as amended*, Act of July 2, 1864, § 4, 13 Stat. 358. Upon its completion of each segment of forty consecutive miles of the road, the railroad company was to be confirmed in its title to such lands by the issuance of patents thereto. Act of July 1, 1862, § 3, 12 Stat. 492. The Act made similar grants to railroad companies in California, Kansas and Missouri to extend existing rail lines to link with the Union Pacific line at both its ends. See Act of July 1, 1862, §§ 9, 10, 13, 12 Stat. 493-96; Gates at 364.

By thus providing for grant of the odd-numbered sections only, Congress created a "checkerboard" effect of alternating public and private ownership that has subsisted to this day in many parts of the western United States. There is no express reservation in the Union Pacific Act of a right of way over the lands so granted for benefit of the lands retained by the United States.

In this case, petitioners Leo Sheep Company and Palm Livestock Company are successors in fee to The Union Pacific Railroad Company, subject to exceptions and reservations of record, with respect to certain odd-numbered sections of land in Carbon County, Wyoming, lying to the east and south of Seminoe Reservoir. These lands were patented to successors of the Union

Pacific in 1900-03 pursuant to the Union Pacific Act; none of the patents contains any reservation of a right of way in the United States. Pet. App. ii.¹ Petitioners do not own or occupy any part of the right of way granted by the Union Pacific Act and the character of rights granted or reserved therein is not at issue in this case. Petitioners conduct ranching operations on the odd-numbered sections pursuant to their fee titles and on the alternating even-numbered sections of public domain lands checkerboarded with their lands by virtue of grazing licenses issued by the United States pursuant to Section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b, and the regulations promulgated thereunder, 43 C.F.R. § 4115.2-1 (1978).² No fences separate petitioners' fee lands from the public domain lands. Pet. App. ii.

This case arose when respondent United States asserted a right to construct, without compensation to petitioners, a road across the fee lands of petitioners for use by the public for access to Seminole Reservoir. Petitioners denied the right of the United States to construct such a road. Thereafter, commencing on December 20, 1973, without the consent of petitioners or the initiation of condemnation proceedings, the United States constructed a road extending from a local county road to the Reservoir across both public domain lands and fee lands of petitioner Leo Sheep Company. Subsequently, respondent erected signs along this road inviting the public to

¹References in this brief to "Pet. App." are references to the appendices contained in the petition for writ of certiorari; references to "R." are references to the pages of the District Court record certified herein.

²See plat attached to the initial opinion of the Tenth Circuit below, at Pet. App. xviii.

use it for access to the Reservoir and its environs. Pet. App. ii-iii.

Petitioners thereafter initiated this action to quiet their respective titles to the fee lands against the United States, pursuant to 28 U.S.C. § 2409a.³ At a pretrial conference, the parties stipulated to the facts concerning petitioners' ownership of the fee lands, the construction of the road across the lands of petitioner Leo Sheep Company without permission or compensation, and the absence of any express reservation by the United States of a right of way in the patents to petitioners' lands. R. 107. All parties then moved for summary judgment. R. 106, 208.

On November 13, 1975, the District Court granted petitioners' motion for summary judgment and quieted their respective titles to the fee lands against the United States. The court held that (i) no act or patent of the United States imposed access easements across the fee lands of petitioners for the benefit of public domain lands and (ii) reservations of easements of necessity burdening the fee lands of petitioners could not be implied in the patents to petitioners' predecessors in title because the sovereign power of eminent domain permitted the United States to condemn such rights of way as it might require for access to public lands. Pet. App. v. The court found that for 110 years after the grant of petitioners' fee lands to The Union Pacific Railroad Company in 1862, no offi-

³Petitioners' Complaint also sought to require the Secretary of the Interior and the Director of the Bureau of Land Management of the Department of the Interior to prepare and circulate an environmental impact statement prior to construction of roads across the railroad grant lands and prior to permitting substantial increase in public use of the Seminole Reservoir, pursuant to Section 102(c) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(c).

cer or agent of the United States had construed the grant or the patents issued pursuant thereto as conferring any right in the United States, its agents or the public to traverse such lands without consent of the owners thereof, and held that condemnation was the only permissible means by which the United States could acquire an interest in petitioners' lands. Pet. App. v.⁴

On appeal of respondents, the Court of Appeals for the Tenth Circuit, in a 2-1 decision, reversed the judgment of the District Court. It held that, even though there was no express reservation of a right of way in the Union Pacific Act, Congress must have intended to — and therefore did in fact by implication — make such a reservation from the grant, because “[t]o hold to the contrary would be to ascribe to Congress a degree of carelessness or lack of foresight which in [the court’s] view would be unwarranted.” Pet. App. xi.

The court did not identify any ambiguity in the language of grant in the Act or the patents and did not point to statutory language, congressional debates or reports, administrative construction, or other indicia of congressional intention to support its conclusion. Nor did it attempt to reconcile its conclusion with the express and unqualified language of grant in the Act. It simply found itself “unable to conclude” that Congress had intended to grant lands to the railroad without reserving a right of access to lands retained by the United States. Pet. App. xi.

Following the decision of the Tenth Circuit, peti-

⁴In light of its decision that the United States had no authority to construct the roads at issue, the District Court declined to determine whether respondents were required to prepare an environmental impact statement. Pet. App. v.

tioners filed a petition for rehearing with a suggestion for *in banc* consideration. Nine months later, on February 28, 1978, the court denied *in banc* consideration by a 4-3 vote and issued a supplemental opinion denying rehearing. Pet. App. xxi-xxvii.

SUMMARY OF ARGUMENT

There is no express reservation of a right of way in the Union Pacific Act or in the patents issued thereunder across the fee lands granted by the Act, and no basis exists for implying one. Under the decisions of this Court, the specific enumeration of other reservations in the Act, coupled with omission of a right-of-way reservation, negates any intention by Congress to reserve some undefined way of passage across the granted lands. The granting of lands by Congress in checkerboard patterns under numerous railway and non-railway acts commencing as early as 1827 without right-of-way reservations in any of them manifests a consistent congressional intention not to reserve rights of way in the checkerboard grants. There was no attention to the question of right-of-way reservations in the legislative history of the Union Pacific Act or, to petitioners' knowledge, in the history of any other checkerboard grant act. The implication of such rights of way was not necessary to achieve the stated purpose of the railroad grant legislation and in fact the railroad grants have been administered consistently for over a century by the United States on the understanding that the grants were absolute and unqualified. In such circumstances, the implication of a reserved right of way over the railroad fee lands constitutes judicial legislation of a kind that has been consistently condemned by decisions of this Court.

But even if a basis existed in 1862 for implication of a reserved right of way in the Union Pacific Act, judicial affirmation of the Government's first assertion thereof over 100 years after the grant would contravene principles of title security long adhered to by this Court and specifically extended by Congress to railway grantees and bona fide purchasers from such grantees. Belated recognition of the rights of way asserted by the Government will unsettle titles to all lands like those of petitioners that rest upon unqualified congressional grants, unqualified patents, unqualified public land records and unrestricted warranties that are based upon such grants, patents and records. If a right-of-way reservation was contained in the land grant legislation, administrative officers of the Government should have expressed such reservation in the numerous patents thereafter issued under the grants and noted its existence on the public land records; they did neither, thereby allowing the lands to be patented, transferred and developed for a century on the basis of unrestricted titles. By attempting now to alter the status of the patents and records to assert such a reservation, they are threatening the integrity of thousands of titles long thought unassailable and thereby destroying the security of all title records derived from the Government. Consistent decisions of this Court, as well as specific congressional legislation, preclude such result.

Decisions and legislation relied upon by the court below to support this belated title challenge by the Government are wholly irrelevant to the title questions presented here. They relate instead to uses of public lands and merely confirm the civil and criminal remedies available to the Government for the unlawful appropriation or

obstruction of such lands. To the extent they have any significance at all for this case, they affirm the right of a patentee and his successors to be free from governmental intrusion upon his lands without payment of just compensation.

ARGUMENT

THE UNITED STATES DID NOT RESERVE EXPRESSLY OR BY IMPLICATION A RIGHT OF WAY ACROSS THE FEE LANDS GRANTED TO THE RAILROAD COMPANIES PURSUANT TO THE UNION PACIFIC ACT.

A. Neither the Language nor the Purpose of the Union Pacific Act Permits an Inference That the United States Reserved a Right of Way Across the Lands Granted.

1. *The Union Pacific Act contains no express reservation of a right of way, and none can be supplied by judicial legislation.*

The Court of Appeals held as a matter of law that rights of way across petitioners' lands were reserved to the United States by implication in the Union Pacific Act. It based that conclusion solely on a presumption that Congress must have intended a reservation but failed inadvertently to express it in the grant. Pet. App. xi.⁵ But

⁵The United States did not challenge in the Court of Appeals the conclusion of the District Court that no common law way of necessity could be implied in favor of the United States with respect to the lands granted under the Union Pacific Act because the sovereign power of eminent domain permitted the United States to take such rights of way for access purposes as it reasonably required. Pet. App. v. Since the issue was not addressed by the Court of Appeals, it is not properly before this Court. *Adickes v. S. H. Kress & Co.*, (Footnote continued next page)

congressional intent in enacting the Union Pacific Act, this Court has said, is subject to "no reasonable doubt. It was to aid in the construction of the road by a gift of lands along its route, *without reservation of rights, except such as were specifically mentioned . . .*" *Missouri, K. & T. Ry. v. Kansas P. Ry.*, 97 U.S. 491, 497 (1878) (emphasis added).

There is no express reservation in the Act of a right of way across the lands granted. Both courts below recognized that fact. Pet. App. ii, x. The language of grant in the Act contains no exception for easements of access or

398 U.S. 144, 147 n.2 (1970); *Husty v. United States*, 282 U.S. 694, 701-02 (1931); *Magruder v. Drury*, 235 U.S. 106, 113 (1914).

If the issue had been considered below, the court would have been required to affirm the trial court's conclusion on several grounds.

First, courts have refused to imply easements of necessity in favor of the sovereign for the obvious reason that there is simply no necessity for such implication when the sovereign can create whatever rights of way it requires by condemnation. See, e.g., *State v. Black Bros.*, 116 Tex. 615, 629-30, 297 S.W. 213, 218-19 (1927); *Pearne v. Coal Creek Min. & Mfg. Co.*, 90 Tenn. 619, 627-28, 18 S.W. 402, 404, (1891); see generally G. Thompson, *Real Property* §§ 362, 364 (1961). Second, if such a way were to be implied in favor of the sovereign, it would have to be reciprocally implied in favor of every grantee from the sovereign and his successors with respect to the surrounding public lands. See *United States v. Rindge*, 208 F. 611, 619 (S.D. Calif. 1913); *Pearne v. Coal Creek Min. & Mfg. Co.*, *supra*; *Guess v. Azar*, 57 So. 2d 443, 445 (Fla. 1952); *Bully Hill Copper Mining & Smelting Co. v. Bruson*, 4 Cal. App. 180, 182-83, 87 P. 237, 238 (1906).

Finally, if the United States were held entitled to a way of necessity over petitioners' land, it would be in a favored position, since Wyoming may no longer recognize such common law easements in the circumstances of this case in light of a state statute providing a means of condemning access on behalf of a landlocked property owner on payment of compensation to the owner of the servient estate. See Wyo. Stat. Ann. §§ 24-9-101 to -104 (1977); *Snell v. Ruppert*, 541 P.2d 1042 (Wyo. 1975); see also *Backhausen v. Mayer*, 204 Wis. 286, 234 N.W. 900 (1931); *Simonson v. McDonald*, 131 Mont. 494, 311 P.2d 982 (1957). Even if the United States is not bound by the decision in *Snell* establishing an incident of state property rights attaching to interests conveyed by the United States (but see *Packer v. Bird*, 137 U.S. 661, 669 (1891)), it would be ironic indeed to hold that the United States, with its undeniable sovereign power to take any access it needs, is entitled to assert a way of necessity in situations where private landowners might not.

any other use; Section 3 provides, in pertinent part:

And be it further enacted, That there be, and is hereby, granted to the said company . . . every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act

Act of July 1, 1862, § 3, 12 Stat. 492. The only exceptions from the grant specifically mentioned in the Union Pacific Act are mineral lands, Government reservations (e.g., military or Indian reservations), and lands sold, reserved or otherwise disposed of by the United States by preemption, homestead, swamp land or other lawful claim, at the time the route of the road was fixed. Act of July 1, 1862, § 3, 12 Stat. 492, *as amended*, Act of July 2, 1864, § 4, 13 Stat. 358.⁶

In *Missouri, K. & T. Ry.*, *supra*, the Court held that in the face of these explicit reservations, the Act could not be construed to have reserved lands selected by another railroad company under a grant subsequent to the Union Pacific Act, since the Act made no express

⁶The 1864 amendment to the Union Pacific Act expanded the definition of the grant to provide that it

shall not defeat or impair any preemption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturalist

Act of July 2, 1864 § 4, 13 Stat. 358.

provision for excepting "from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads." 97 U.S. at 499. Similarly, in *Railroad Co. v. Baldwin*, 103 U.S. 426 (1880), the Court held that the grant of the railroad right of way under an act similar to the Union Pacific Act was absolute and unqualified, and not subject to exception even for lands claimed by private persons prior to location of the route:

The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the right of way been intended, it can hardly be doubted that it would have been expressed. *The fact that none is expressed is conclusive that none exists.*

103 U.S. at 430 (emphasis added). Cf. *United States v. Denver & R.G. Ry.*, 150 U.S. 1, 11 (1893).⁷

Where, as here, the language of a statute is not found to be ambiguous or in any way unclear, a court is not permitted to divine some unexpressed congressional purpose to negate the statutory language employed. See *Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 36-37 (1895); *United States v. Missouri P.R.R.*, 278 U.S. 269, 277-78 (1929); *United States v. First National Bank*, 234 U.S. 245, 260, 262 (1914). "[A]ll the reasons that induced [the Act's] enactment and all of its purposes must be

⁷See also *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617 (1944) ("Exemptions made in such detail preclude their enlargement by implication."); *Kendall v. United States*, 107 U.S. 123 (1883); *Ebert v. Poston*, 266 U.S. 548, 554 (1925).

supposed to be satisfied and expressed by its words" *Mackenzie v. Hare*, 239 U.S. 299, 308 (1915). Principles of statutory construction should not become a smokescreen for judicial legislation; the judicial function is "to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry.*, 343 U.S. 562, 575 (1952); see *United States v. Goldenberg*, 168 U.S. 95, 103 (1897) ("No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."); *Hyde v. Shine*, 199 U.S. 62, 78 (1905) ("Where the statute contains no exception, the courts cannot create one."); *Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438, 451-52 (1901). Seventy-eight years ago, Justice Harlan described the principles of statutory construction that control the result in this case:

Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such. Here the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the actual import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed.

Dewey v. United States, 178 U.S. 510, 521 (1900).

It was not the province of the Court of Appeals to

insert into the Act a reservation for a right of way that Congress had neglected to provide for, when the result was to negate express statutory language, and when Congress paid such close attention to the types of interests that were to be excluded from the grant;⁸ to do so "would be to legislate and not to construe." *Hobbs v. McLean*, 117 U.S. 567, 579 (1886); cf. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

2. *Longstanding administrative practice and construction confirm the absence of a reserved right of way in the Union Pacific Act.*

The Court of Appeals did not in its opinion consider the interpretation of the Union Pacific grant by the Interior Department or other federal agencies. However, as pointed out by Judge Barrett in his dissent below, Pet. App. xix, the trial court in this case found that for 110 years no federal agency or official construed the Union Pacific Act to have reserved a right of way over the lands granted for benefit of the lands retained. Pet. App. v.⁹ The absence of any such construction by "those who presumably would be alert" to have asserted it is itself an indication that no right of way was reserved. *F.T.C. v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941); see also *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498,

⁸In addition to the express reservations in the Act for mineral lands and lands previously disposed of under the public land laws, Congress did consider and reject an amendment to the Act that would have permitted access to the granted lands for mining purposes. Cong. Globe, 37th Cong., 2d Sess. 1909-10 (1862).

⁹Indeed, the United States did not even contend in the trial court in this case that a right of way reservation should be implied in the Union Pacific Act by reason of congressional intent, as the Court of Appeals recognized. Pet. App. xxv.

513-14 (1949).

Beyond this, however, the Secretary of the Interior expressly determined nearly a century ago that nothing in either the Union Pacific Act or the Unlawful Inclosures Act permitted the United States to construct roads across the lands granted to the railroads without payment of just compensation in accordance with constitutional requirements. In his annual report to Congress in 1887, the Secretary recommended that Congress enact legislation establishing a public highway around each section of public land retained by the government, with the section lines at the center, to provide access to the public sections; to the extent that land to be taken for such highways had already passed from the Government into the hands of private parties, the Secretary observed, "the bill should provide for necessary compensation." 1 *Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1887*, at 15 (1887); see also 1 *Report of the Secretary of the Interior for Fiscal Year Ending June 30, 1888*, at xvii (1888). This interpretation has been confirmed countless times by the issuance of thousands of patents to checkerboard grant lands by Government agents without reservation of any right of way therein.

As a nearly contemporaneous, consistent and long-standing construction of the railroad grants by the official most concerned with its implementation, therefore, it was entitled to great weight in construction of the grants, see *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Great N. Ry. v. United States*, 315 U.S. 262, 275 (1942); *United States v. Healey*, 160 U.S. 136, 141 (1895), especially since it confirmed the existing record and adoption of the opposite construction "would disturb titles derived from such

[grants], and lead to great confusion and litigation." *Iron Silver Mining Co. v. Elgin Mining & Smelting Co.*, 118 U.S. 196, 208 (1886); see *United States v. Union P. Ry.*, 148 U.S. 562, 572 (1893); *Louisiana v. Garfield*, 211 U.S. 70, 76 (1908). Where, as here, vast numbers of people have acquired their lands on the basis of this administrative construction, it should not be rejected unless it is "plainly or palpably wrong," *Hewitt v. Schultz*, 180 U.S. 139, 157 (1900), a conclusion plainly inappropriate here in light of the statutory language and decisions of this Court described above supporting the administrative practice.

3. *The purpose of the Union Pacific Act, as reflected in its legislative history, provides no support for implication of a reserved right of way.*

The Court of Appeals managed to qualify the absolute and unconditional language of grant in the Union Pacific Act, despite the statutory language, decisions of this Court, and administrative construction confirming the absence of any such limitation, by identifying a legislative purpose of the Union Pacific Act to be the settlement of the West and assuming from this (i) that Congress used a checkerboard pattern of grant in furtherance of that purpose, (ii) that prudent policy would have dictated reservation of rights of way over the granted lands, and (iii) that the legislative purpose required effectuating that policy by judicial implication in 1877 of rights of way in the 1862 grant. These assumptions are all erroneous.

First, the checkerboard pattern of grant was initiated long before the Union Pacific Act for purposes unrelated

to those manifested by that Act. Congress first utilized the device in 1827 in grants to states for internal improvements, on the theory that the value of the lands granted could be recouped by retaining contiguous lands which would presumably be enhanced in value by the construction of the improvements; the first railroad grant, in 1850, merely continued the established pattern, for the same stated reason, and the Union Pacific Act differed in form from the numerous grants of the 1850's only in its provision for direct grant to the railroad companies instead of to the states as conduits for the grant.¹⁰ Re-

¹⁰The first congressional donation of land in support of internal improvements was the Act of February 28, 1823, ch. 16, 3 Stat. 727, which granted a tract of land 120 feet wide, together with one mile of land on each side thereof, to the State of Ohio for construction of a road. In 1824 Congress granted a strip of land to the State of Indiana for construction of a canal and provided for the reservation from sale of every section through which the canal route should pass. Act of May 26, 1824, ch. 165, 4 Stat. 47. Three years later, Congress inaugurated the alternate-section principle in connection with the same canal, granting the State of Indiana "a quantity of land equal to one half of five sections in width, on each side of said canal, and reserving each alternate section to the United States" Act of March 2, 1827, ch. 56, 4 Stat. 36; see Gates at 345, 347. A companion measure granted to the State of Ohio "one half of a quantity of land equal to two sections" on one side of a road to be constructed by the state, reserving each alternate section to the United States. Act of March 3, 1827, ch. 31, 4 Stat. 242.

By 1850 the principle of granting alternate sections was firmly established, although it had been primarily employed in connection with grants for canal construction. See Gates at 345-56. In that year, Congress enacted the first railroad land grant act, to the States of Illinois, Mississippi and Alabama, an act that was taken as a model for nearly all future railroad land grants to the states and private companies. See J. Sanborn, *Congressional Grants of Land in Aid of Railways* 76-77 (1899); Gates at 356-69. It granted a 100-foot right of way together with half the land in even-numbered sections (after 1853, the odd-numbered sections were granted) within six miles of the railroad line, provided that the reserved odd-numbered sections should not be sold and provided that, if the railroad were not completed within 10 years, title to lands remaining unsold at that time would revert to the United States. Act of September 20, 1850, ch. 61, §§ 2, 3, 5, 9 Stat. 466-67. The sponsor of the bill, Senator Douglas of Illinois, explaining the provisions relating to the grant of alternate sections, described it as "an old practice, long sanctioned by the Government." Cong. Globe, 31st Cong., 1st Sess. 843 (April 29, 1850).

(Footnote continued next page)

tention of the even-numbered sections by the Government for possible development and sale was not the *purpose* of the railroad grant legislation, as the Court of Appeals thought, but was merely a byproduct of the mechanism adopted by Congress to finance great public improvements.

Second, although it may have seemed now to the Court of Appeals that a prudent Congress would have provided for reservation of rights of way in the 1862 Union Pacific grant, legislative intent must be determined under the circumstances existing as of the time of the grant, not by applying judicial notions of wise policy based on 115 years of change. See, *e.g.*, *Mobile & O.R.R. v. State of Tennessee*, 153 U.S. 486, 502 (1894); *Platt v. Union P.R.R.*, 99 U.S. 48, 64 (1878). The fact is that despite 35 years of past experience with checkerboard land grants, Congress inserted no reservation of a right of way in the Union Pacific Act, or, to petitioners' knowledge, in any other congressional railroad grant, and there was no discussion of the access question in any congressional debate or report. See, *e.g.*, Cong. Globe, 37th Cong., 2d Sess. 1906-13, 2749-62, 2776-89, 2804-18 (1862); Cong. Globe, 38th Cong., 1st Sess. 2376-84, 2395-2404, 2417-24, 3148-56 (1864). Congress was simply not concerned with the question, no doubt assuming that any access impediment that did in fact occur could have easily been remedied by exercise of the sovereign power of eminent domain. See *Northern P. Ry. v. Townsend*, 190 U.S. 267, 272 (1903); see also note 19, *infra*. In such circumstances, it was improper for the court below to indulge its own notions of sensible policy by inferring a

Following the 1850 grant, Congress granted millions of acres to the states and private companies on a checkerboard basis for construction of various roads throughout the United States, including between 100 and 110 million acres promised to the four transcontinental railroads sponsored by Congress between 1862 and 1871. See Gates at 360-68, 373-79, 384-85.

congressional intention that simply did not exist.

Third, no right-of-way reservation was contained in any of the patents to the Union Pacific lands or was noted on the public land records with respect to such lands, the United States did not assert the existence of such a right of way for some 110 years following the grant, and no apparent impediment to the settlement of the West has occurred during the many years that the claimed right of way lay dormant. The time to imply the reservation to effectuate the congressional purpose identified by the Court of Appeals was at the time of construction and early operation of the railroad, when the West was empty, not 100 years later when the supposed legislative objective has long since been accomplished.

Finally, the legislative purpose of settling the West, as with the other public purposes to be served by completion of the transcontinental line, does not furnish the yardstick by which this Court has said the scope of the grant must be measured. Rather, the Court has held that the "overshadowing motive that dictated the act of 1862" was to induce private capital to construct the road.¹¹ *Platt*

¹¹Although proposals for a transcontinental railroad had surfaced as early as the 1830's, and were debated by the public and in the Congress with intensity, see Gates at 362-63, 373-74, it was the Civil War that provided the impetus and opportunity for the Union Pacific Act. Congress became concerned for the safety of the Pacific states and thought that their protection "could be done in no better way than by the construction of a railroad across the continent [which] would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies." *United States v. Union P.R.R.*, 91 U.S. 72, 80 (1875). In addition, the road would facilitate utilization of the "vast unpeopled territory lying between the Missouri and Sacramento Rivers" by permitting development of the agricultural and mineral resources of that territory and the making of settlements "where settlements were possible," and would satisfy the pressing need "of an improved and cheaper method for the transportation of the mails, and of supplies for the army and the Indians." 91 U.S. at 80.

v. Union P.R.R., 99 U.S. 48, 59 (1878); see *United States v. Union P.R.R.*, 91 U.S. 72, 81 (1875). This was the purpose of Congress, "above all others"; it was

[o]nly for that the grants of land were made. All was intended to give the utmost possible assistance to the stupendous and unparalleled enterprise [T]he *paramount* intention of Congress was to give such assistance to the company as to induce them to build the road. Every other consideration was subordinate to that.

Platt v. Union P.R.R., *supra*, 99 U.S. at 60 (emphasis added).

This purpose, as the Court noted in *United States v. Union P.R.R.*, *supra*, 91 U.S. at 82, is reflected in the title to the Act: "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure the Government the Use of the Same for Postal, Military, and Other Purposes." The granting clause itself recites that the grant of alternate sections was made "for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon" Act of July 1, 1862, § 3, 12 Stat. 492. See also Act of July 1, 1862, § 18, 12 Stat. 497. The 1864 amendment to the Act granted new privileges and greater rights to the railroad companies when it became apparent that the benefits offered by the 1862 legislation had not provided sufficient inducement to cause the road to be built. See *Platt v. Union P.R.R.*, *supra*, 99 U.S. at 59-60.

For this reason, the Court in *Missouri, K. & T. Ry.*, *supra*, refused to imply reservations from the grant in addition to those expressly provided by Congress, and in *Platt v. Union P.R.R.*, *supra*, upheld the wholesale mortgaging of the lands by The Union Pacific Railroad Company to finance construction as a "disposition" of the lands within the meaning of the Act that prevented their forfeiture for nondisposition within three years from completion of the road. See Act of July 1, 1862, § 3, 12 Stat. 492. In light of this congressional purpose, the Court has held that the railroad grant legislation should receive a "liberal construction in favor of the purposes for which it was enacted," and is not to be construed "to withhold what is given either expressly or by necessary or fair implication." *United States v. Denver & R.G. Ry.*, 150 U.S. 1, 14 (1893); see also *Russell v. Sebastian*, 233 U.S. 195, 205 (1914); *Nadeau v. Union P.R.R.*, 253 U.S. 442, 444 (1920).¹²

¹²In the *Denver & Rio Grande* case, the Court interpreted a railroad grant similar to the Union Pacific Act to permit the railroad company to utilize timber taken from public lands adjacent to the route of the road for the purpose of constructing railroad facilities distant from the places where the timber was taken, under statutory language permitting the taking of timber and other material from public lands "adjacent" to the road that was "necessary for the construction thereof." Plaintiff argued that the railroad company was limited by the act to utilizing the materials on lands near their source and that they could not, in any event, be utilized for the construction of auxiliary facilities such as depots, section houses, stock yards, etc. With respect to the first contention, the Court held that the failure of the act to contain any limitation on place of use, in light of the statutory purpose of aiding the company in its construction of the road, precluded implying such a restriction: "If Congress had intended to impose any such restriction upon the use of timber or other material taken from adjacent public lands, it should have been so expressed." 150 U.S. at 11. With respect to the second argument, the Court held that the legislative purpose to aid in the construction of the road included all structures necessary to its operation; acknowledging the "well settled rule of this court that public grants are construed strictly against the grantees," the Court nevertheless held that such grants "are not to be so construed as

(Footnote continued next page)

Accordingly, plain statutory language, longstanding administrative practice, and explicit legislative history confirm the decision of this Court that the congressional purpose was to aid construction of the road "by a gift of lands along its route, without reservation of rights, except such as were specifically mentioned." *Missouri, K. & T. Ry. v. Kansas P. Ry.*, *supra*, 97 U.S. at 497. No right-of-way reservation was specifically mentioned in the Union Pacific Act, and therefore no such reservation can be held to exist.

B. Judicial Implication of Reservations in Unconditional Government Grants Would Contravene Decisions of This Court Protecting Title Security and Would Cloud Innumerable Titles Long Thought Unassailable.

Under the Union Pacific Act, some 34,000,000 acres of lands were granted by Congress to the Union Pacific and other roads. See Gates at 367. By similar legislation in 1864, Congress granted more than 45,000,000 acres to the Northern Pacific Railroad Company for construction of a northern route to the Pacific. Act of July 2, 1864, ch. 217, 13 Stat. 365; see Gates at 374. In all, over 131,000,000 acres of land were granted either directly to the railroad companies or to western and southern states for ultimate disposition to the companies, and another 17,000,000 acres were granted to the states for roads, canals and other improvements. See *id.* at 379, 384-85. Virtually all this acreage was granted on the "checkerboard" pattern at issue in this case. See note 10, *supra*. No patent to any of this acreage, to petitioners' knowledge, reserved

to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication," and held that a "liberal construction" of the grant permitted the railroad company to utilize the timber and other materials for construction of auxiliary facilities. 150 U.S. at 14.

to the United States the rights it now claims to have been implicit in the Union Pacific Act or other checkerboard land grant acts.

A patent is the instrument which provides documentary evidence of the federal grant and confirms that all action necessary to perfect title thereto has been taken by the grantee or his successors. See *Langdeau v. Hanes*, 88 U.S. (21 Wall.) 521, 529 (1874); *Deseret Salt Co. v. Tarpey*, 142 U.S. 141 (1891); *St. Paul & P.R.R. v. Northern P.R.R.*, 139 U.S. 1, 6 (1891). It carries "the implication that all determinations essential to the passing of title have been made." *West v. Standard Oil Co.*, 265 U.S. 200, 214 (1929); see *United States v. Coronado Beach Co.*, 255 U.S. 472, 488 (1921). Consequently, it is through the recognition of a patent "as a record of the government that its security and protection chiefly lie." *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 492 (1865). It is the "unassailable character" of a patent which "gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces." *Smelting Co. v. Kemp*, 104 U.S. 636, 641 (1881). It cannot grant what Congress has not authorized; it cannot reserve expressly or by implication that which the Congress has granted. *Shaw v. Kellogg*, 170 U.S. 312, 337-38 (1898); *Deffebacke v. Hawke*, 115 U.S. 392, 406 (1885); *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 332 (1924).

In this case, as is true with respect to all the checkerboard grant legislation, the patents confirmed the grants without any right of way reservation, were so noted in the public land records and became the muniments of private titles. No prospective purchaser of the lands covered thereby could have found a right-of-way reservation

from examining either the underlying legislation, the patents or the public land records over the 75 years following the issuance of the patents. The decision below, implying the existence of an unexpressed reservation in all such patents, would impair the rights not only of the patentees but also of bona fide purchasers succeeding to their titles, long after the time when the rights of both groups had become unassailable under decisions of this Court and the specific mandate of Congress.

The Court has consistently rejected construction of congressional grants that would render the titles derived therefrom uncertain or open to challenge.¹³ In the context of the railroad grants in particular, the Court has had frequent occasion to emphasize the importance of the documentary title record in confirming the titles of the

¹³The Court has long emphasized the importance of the security of titles as a factor in statutory interpretation. When, for example, a statutory construction would be permissible but would "disturb numerous titles," the Court has held that it is not to be adopted unless it is "clearly the proper one." *Beals v. Hale*, 45 U.S. (4 How.) 37, 53 (1846). When a statute has long existed and many titles have been founded on its consistent construction, the Court has cautioned, a court must be "even astute in avoiding a [different] construction which may be productive of much litigation and insecurity of titles." *Lessee of Doolittle v. Bryan*, 55 U.S. (14 How.) 563, 567 (1852). See *Iron Silver Mining Co. v. Elgin Mining & Smelting Co.*, 118 U.S. 196 (1886); *Louisiana v. Garfield*, 211 U.S. 70, 76 (1908).

The Court has also long recognized that "the respect due to a patent, the presumption that all the preceding steps required by the law had been observed before its issue, [and] the immense importance and necessity of the stability of titles dependent upon these instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are . . . sustained by . . . that class of evidence which commands respect, and that amount of it which produces conviction . . ." *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381 (1887); see *Wright-Blodgett Co. v. United States*, 236 U.S. 397, 403 (1915).

Even the court below conceded that the issue of congressional intent in the Union Pacific Act was "not one which is free from all doubt." Pet. App. xxvii.

railroads and their grantees. For example, the Court has held that the Union Pacific Act did not reserve lands along the route claimed by another company under a subsequent railroad grant, because no such reservation was "specifically mentioned" in the Act. *Missouri, K. & T. Ry. v. Kansas P. Ry.*, 97 U.S. 491, 497 (1878). See pp. 10-12, *supra*. Similarly, in *Van Wyck v. Knevals*, 106 U.S. 360 (1882), and *Kansas P. Ry. v. Dunmeyer*, 113 U.S. 629 (1885), the Court determined that the time when the title of the railroad company vested was that of the filing of the ways of definite location of the route in the General Land Office, so that oral testimony of the time of surveying and marking the route on the ground with respect to each section of land was unnecessary and that there was established "a date at which, by record, the title of the railroad company could be considered as definitely ascertained." *Tarpey v. Madsen*, 178 U.S. 215, 223 (1900). This requirement of record filing was also extended by the Court in a series of decisions to individuals entering upon lands ultimately included within the boundaries of a railroad grant, so that the lands reserved from the grant were only those on which proper filings in the local land office had been made at the time the map of definite location was filed. See *Tarpey v. Madsen, supra*; *Northern P.R.R. v. Colburn*, 164 U.S. 383 (1896); *Whitney v. Taylor*, 158 U.S. 85, 94 (1895).

In *Tarpey*, the Court explained the rationale of these decisions:

. . . Congress in making a grant to a railroad company intended that it should be of present force, and of force with reasonable certainty. It meant a substantial present donation of something which the rail-

road company could at once use, and use with knowledge of that which it had received. It cannot be supposed that Congress contemplated that, as in this case, a score of years after the line of definite location had been fixed and made a matter of record, some one should take possession of a tract apparently granted, and defeat the company's record title by oral testimony, that at the time of the filing of the map of definite location there was an actual though departed occupant of the tract, and therefore that the title to it never passed.

178 U.S. at 227. If the rule were otherwise, the Court observed, "the time will never come at which it can be certain that the railroad company has acquired an indefeasible title to any tract." 178 U.S. at 228-29.

Similarly, in *Burke v. Southern P.R.R.*, 234 U.S. 669 (1914), the Court held that the reservation in a railroad grant of "mineral lands" was a reservation of only those lands actually identified as mineral in character as of the time of patent, not a reservation of lands ultimately found to be mineral long after record title had passed. Otherwise, the Court stated, "great uncertainty in titles, conflicting claims, and vexatious litigation would be inevitable." 234 U.S. at 684. The patents were to confirm the title of the railroad company by confirming compliance with the terms of the grant (i.e., construction of the road) and identifying the lands passing thereunder, and therefore it was imperative, the Court held, that patents not be issued for lands excluded from the grant and that there be a point in time when the rights of the railroad company were finally determined and fixed of record. See 234 U.S. at 685-92; cf. *Iron Silver Mining Co.*

v. Elgin Mining & Smelting Co., 118 U.S. 196, 207 (1886). The Secretary of the Interior could not, the Court held, avoid this result by inserting an exception in a patent for mineral lands thereafter found in the tracts conveyed, since the Secretary had no authority to reserve what the law had explicitly granted. See 234 U.S. at 696-705. See also *Shaw v. Kellogg*, *supra*, 170 U.S. at 337-38; *Deffenbacke v. Hawke*, *supra*, 115 U.S. at 406.

Congress too has manifested its concern that the patents issued to railroad grant lands establish an unassailable record, even in situations in which the patents were erroneously issued for lands not properly included within the scope of a railroad grant. In 1891, in order "to make titles resting upon patents dependably secure," *United States v. Whited & Wheless*, 246 U.S. 552, 562 (1918), cf. *United States v. Oregon Lumber Co.*, 260 U.S. 290, 299-300 (1922), Congress enacted legislation providing that no attack on a patent by the United States could be made more than six years after its issuance, 43 U.S.C. § 1166, and five years later enacted a six-year statute of limitations specifically for suits by the United States to vacate patents erroneously issued under the railroad grant legislation with the proviso that "no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." 43 U.S.C. § 900. By such legislation, Congress

recognized that, as against itself in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government, such conveyances should, after the lapse of a prescribed time, be conclusive against the Govern-

ment, and this notwithstanding any errors, irregularities, or improper action of its officers therein.

United States v. Winona & St. P.R.R., 165 U.S. 463, 476 (1897); see *United States v. Chandler-Dunbar Water Power Co.*, 209 U.S. 447 (1908); *United States v. Coronado Beach Co.*, 255 U.S. 472, 488 (1921). In other words, the Court said, "the patent would become *conclusive* as a transfer of the title" as against the United States after the limitation period had run, 165 U.S. at 476 (emphasis added), and the titles of bona fide purchasers derived from such patents were to be confirmed in any event, "notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation" 165 U.S. at 481. See *United States v. Southern P.R.R.*, 184 U.S. 49 (1902).

By this legislation, Congress confirmed decisions of this Court protecting the rights of bona fide purchasers of railroad grant lands. In *United States v. California & Oregon Land Co.*, 148 U.S. 31 (1893), the Court held that the titles of bona fide purchasers of lands granted by Congress to the State of Oregon for construction of a wagon road could not be challenged by the United States even if the certification by the state that the road had been constructed had been fraudulently obtained, where it was not shown that the purchasers knew of any defect in their titles at the time of their purchases; "[i]f a patent from the government be presented," the Court said, "surely a purchaser from the patentee is not derelict . . . because he relies upon the determination made by the land officers of the government in executing the patent, and does not institute a personal inquiry into all the anterior trans-

actions upon which the patent rested." 148 U.S. at 45. See *United States v. Burlington & M.R. R.R.*, 98 U.S. 334, 342 (1878); *United States v. Stinson*, 197 U.S. 200 (1905).¹⁴ Even when there is "satisfactory proof" of fraud in obtaining a patent, once the legal title has passed from the patentee, "bona fide purchaser for value is a perfect defense." *Wright-Blodgett Co. v. United States*, 236 U.S. 397, 403 (1915).

In this case, the decision of the Court of Appeals creates precisely the title uncertainty and potential for litigation condemned by the Court in the railroad grant cases and disapproved by Congress in its patent confirmation legislation. Under the decision below, no grantee of railroad grant lands could ever be certain that the United States would not assert a noncompensable way over his lands for some public purpose, however remote

¹⁴The patent confirmation legislation was merely the last in a series of acts passed by Congress to protect the rights of settlers or bona fide purchasers of railroad grant lands who had no way of ascertaining from the public land records that the lands which they had improved or purchased were not legally available. See 43 U.S.C. §§ 888-902, 905-06.

For example, Congress provided in 1876 for confirmation of and issuance of patents with respect to preemptions and homestead entries made in good faith on small tracts of public lands within the limits of a land grant prior to the time when notice of withdrawal of the lands embraced in the grant was received at the local land office, 43 U.S.C. § 890; see *Northern P.R.R. v. Amacker*, 175 U.S. 564 (1900), and for issuance of patents for all such entries made "in pursuance of the rules and instructions" of the Land Department within the limits of any land grant after expiration of the grant, 43 U.S.C. § 892. In 1887, Congress provided for issuance of patents to persons who had purchased in good faith from the grantee railroad companies lands that had been erroneously certified or patented to the grantees, 43 U.S.C. § 897, and it was held by this Court that persons protected under this legislation included those who relied on the apparent record transfer of title effected by governmental certification of the grant. See *Logan v. Davis*, 233 U.S. 613 (1914); *United States v. Chicago, M. & St. P. Ry.*, 195 U.S. 524 (1904); *United States v. Winona & St. P. R.R.*, 165 U.S. 463 (1897).

from purposes envisioned a century ago and regardless of the present degree of development of the lands. In addition, no prospective purchaser of such lands could ever be sure that he had acquired unencumbered title even after examination of the patents to the lands, the public land records and the enabling legislation. There would be, in short, no "date at which, by record, the title of the [successors to] the railroad compan[ies] could be considered as definitely ascertained." *Tarpey v. Madsen*, *supra*, 178 U.S. at 223.

Accordingly, although it may be entirely appropriate to imply reservations of rights that are *consistent* with and ordinarily incident to express congressional reservations,¹⁵ the decisions of this Court condemn the clouding of unqualified record titles by the implication of government reservations *inconsistent* with the terms of the grants on which they are based. As the Court said in *Burke*, *supra*,

'A patent upon its face should either grant or not grant. It must be seen from a construction of the language of the grant [patent] itself whether any-

¹⁵ For example, water right reservations have sometimes been implied where consistent with and supportive of express federal reservations of land for water dependent purposes. See, e.g., *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 595-601 (1963). In such cases, the implied reservation is based upon and derived from the language and purpose of the express reservation; it is an appurtenance to the express reservation, in no way alters the meaning and effect of clear language of grant or reservation in the operative title documents, and has no impact on titles to lands derived from the United States. See *United States v. State of New Mexico*, 46 U.S.L.W. 5010 (U.S. Sup. Ct. No. 77-510, July 3, 1978). In no such case has a right been implied in favor of the United States that is *inconsistent* with any language of congressional or administrative grant or has an implied reservation been condoned to withhold what is given "either expressly or by necessary or fair implication." *United States v. Denver & R.G. Ry.*, 150 U.S. 1, 14 (1893); see *Russell v. Sebastian*, 233 U.S. 195, 205 (1914).

thing is granted or not, and, if anything be granted, what it is.'

234 U.S. at 698-99, quoting *Cowell v. Lammers*, 21 F. 200, 208 (C.C.D. Calif. 1884).

C. Federal Legislation and Decisions of This Court Prohibiting Appropriation of the Public Domain Provide No Support for the Decision Below.

In its opinion below, the Court of Appeals professes to find recognition of an 1862 reservation in (i) the enactment by Congress of the Unlawful Inclosures Act in 1885, (ii) the decision of this Court in *Camfield v. United States*, 167 U.S. 518 (1897), construing that Act, and (iii) the decision of this Court in *Buford v. Houtz*, 133 U.S. 320 (1890). None of these authorities provides any such support.

Section 3 of the Unlawful Inclosures Act, 43 U.S.C. § 1063, prohibits the prevention or obstruction of free passage over the public lands by "force, threats, intimidation . . . or any other unlawful means." The Tenth Circuit did not hold in this case, and the United States did not contend, that petitioners unlawfully obstructed the public domain; title to petitioners' lands, not use of the public domain, is the sole issue in this case. The court also did not hold, and the United States did not contend, that the Unlawful Inclosures Act retroactively imposed rights of way on petitioners' lands because of their proximity to public lands, although that was the theory under which the United States proceeded in the trial court.¹⁶ See

¹⁶ Those courts that have considered the question have agreed with the District Court in this case that the Unlawful Inclosures Act did not by its terms impose rights of way over privately owned lands.

(Footnote continued next page)

Answer to Complaint, §§ 4, 12, R. 29-30; Defendants' Substituted Proposed Findings of Fact and Conclusions of Law, Conclusion ¶ 3, R. 308. Rather, the court held that the Unlawful Inclosures Act was "evidence of congressional recognition in 1885 that there was . . . an implied reservation in the 1862 railroad grant." Pet. App. xi-xii, xvi.

The language of the Unlawful Inclosures Act, however, shows it to be a remedial statute designed to deal with the limited problem of large-scale fencing of the public domain by cattlemen; it is concerned with unlawful appropriation of the public domain, not the creation or affirmation of rights of access across private lands. "[A]ll its provisions related to public lands — not to private lands." *United States v. Buchanan*, 232 U.S. 72, 75 (1914); see *Homer v. United States*, 185 F. 741, 747 (8th Cir. 1911) (Van Devanter, J., dissenting). It "was designed to prevent the illegal fencing of public lands," *Omaechevarria v. State of Idaho*, 246 U.S. 343, 349-50 (1918), "to sanction free passage over the public lands and to make the obstruction thereof by *unlawful* means

See *United States v. Rindge*, 208 F. 611, 622-23 (S.D. Calif. 1913); *United States v. Douglas-Willan Sartoris Co.*, 3 Wyo. 287, 300, 22 P. 92, 97 (1889). Of course, to the extent that the Act were applied to impose encumbrances on lands granted prior to its effective date, it would be unconstitutional. See *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *United States v. Causby*, 328 U.S. 256, 261-62 (1946). Since the grants to the Union Pacific took effect as of the date of the Union Pacific Act once the lands granted were identified by reason of location of the route and vested by completion of the road, see *St. Paul & P.R.R. v. Northern P.R.R.*, 139 U.S. 1, 6 (1891), *Wisconsin C.R.R. v. Price County*, 133 U.S. 496, 509 (1890), Congress could not by subsequent legislation impair the titles so vested; the United States

cannot legislate back to themselves, without making compensation, the lands they have given [the Union Pacific Railroad Company] to aid in the construction of its railroad No change can be made in the title created by the grant of the lands . . . without the consent of the corporation.

Union P.R.R. v. United States, 99 U.S. 700, 719 (1878).

a punishable offense." *McKelvey v. United States*, 260 U.S. 353, 359 (1922) (emphasis added).

Section 1 of the Unlawful Inclosures Act makes unlawful all enclosures of the public lands "made, erected, or constructed," as well as the assertion of a right to the exclusive use and occupancy of the public lands, by any person without color of title to the lands enclosed or appropriated. 43 U.S.C. § 1061. Section 2 of the Act requires the United States Attorney, on request of any citizen, to institute a civil suit in federal court to restrain violations of the Act; if the "inclosure" is found to be unlawful in such proceedings, the court is to order its summary destruction. 43 U.S.C. § 1062. Section 3 of the Act, quoted above, prohibits the obstruction of free passage over the public lands. 43 U.S.C. § 1063. Section 4 provides criminal penalties for any person violating any provision of the Act. 43 U.S.C. § 1064. Section 5 authorizes the President to take any necessary measures to "remove and destroy any unlawful inclosure of any of the public lands," and Section 6 requires consent of the Secretary of the Interior to any suit under the Act involving alleged inclosures of no more than 160 acres. 43 U.S.C. §§ 1065, 1066.

The history of the Unlawful Inclosures Act confirms the purpose of the Act, reflected in its language, to secure summary abatement of, and to impose criminal penalties for, unlawful occupation of and obstruction of free passage over the public lands of the United States. It "was passed in view of a practice which had become common in the Western Territories of enclosing large areas of lands of the United States by associations of cattle raisers, who were mere trespassers, without shadow of title to

such lands, and surrounding them by barbed wire fences, by which persons desiring to become settlers upon such lands were driven or frightened away, in some cases by threats or violence." *Cameron v. United States*, 148 U.S. 301, 305 (1893); see Gates at 466-68, 473-74.¹⁷ There is not

¹⁷Following the invention of barbed wire in the 1870's, cattlemen began to fence large portions of the public domain to keep both settlers and other stockmen out of their accustomed grazing grounds. See *Golconda Cattle Co. v. United States*, 201 F. 281, 284-85 (9th Cir. 1912), *rev'd on reh.*, 214 F. 903 (9th Cir. 1914); *Healy v. Smith*, 14 Wyo. 263, 281-84, 83 P. 583, 586-87 (1906); Gates at 466-67. In his report for the year 1882, the Secretary of the Interior noted that the "illegal inclosure of the public lands in certain States and Territories, and the exclusive occupation of large tracts by private parties to the deprivation of the rights of others and the impediment of settlement and intercourse, have become matters of serious complaint." 1 *Report of the Secretary of the Interior for the Fiscal Year Ending June 30, 1882*, at 13 (1882). Noting that existing laws only authorized the President to direct United States marshals to remove unlawful boundaries placed on public lands and to remove persons unlawfully in possession thereof, the Secretary recommended enactment of a statute "imposing penalties for the unlawful inclosure of the public lands, for and preventing by force or intimidation legal settlement and entry." *Id.* at 13-14 (emphasis added). See also 1 *Report of the Secretary of the Interior for the Fiscal Year Ending June 30, 1883*, at xxxii (1883); 1 *Report of the Secretary of the Interior for the Fiscal Year Ending June 30, 1884*, at xvii (1884).

On April 23, 1884, the Committee on the Public Lands of the House of Representatives reported favorably H.R. 5479, which ultimately became the Unlawful Inclosures Act. See H.R. Rep. No. 1325, 48th Cong., 1st Sess. (1884). The report referred to the vast correspondence amassed by the Land Office on the matter of illegal fencing and included communications from the Commissioner and Acting Commissioner of the Land Office describing why existing laws were inadequate: Much of the land involved was unsurveyed, and insufficient funds and personnel were available to compile accurate descriptions of unlawfully enclosed lands necessary to bring suits in equity; there were no laws under which illegal fencers could be prosecuted criminally; and the ordinary procedures for referring civil suits to the Department of Justice, having such suits investigated, filing suit and awaiting the culmination of slow judicial proceedings all tended to render the Land Office virtually powerless to remedy the situation. *Id.* at 4-5; see Sen. Ex. Doc. No. 61, 47th Cong., 2d Sess. (1883); Sen. Ex. Doc. No. 127, 48th Cong., 1st Sess. (1884); Gates at 467. The bill reported by the Committee was aimed at remedying these deficiencies in existing law. "This bill," the Committee stated, "declares these inclosures unlawful; allows the citizen to abate them as public nuisances, a right the

(Footnote continued next page)

a hint in the congressional debates on the bill of any intention that the bill permit the United States or any person to acquire any right in privately owned lands or that it provide legislative recognition of the existence of any federal right of way over any lands previously granted by the United States; the focus was exclusively on removal of unlawful physical obstructions and punishment of acts of intimidation and violence that effected exclusive occupancy of the public lands.¹⁸

common law of England gives, and which has been exercised time out of mind. It puts the whole machinery of the law and the power of the Government at the command of any citizen and without awaiting the circumlocution of executive action." H.R. Rep. No. 1325, *supra*, at 7.

¹⁸See generally Cong. Record, 48th Cong., 1st Sess. 4769-82 (June 3, 1884). In the House, the sponsor of the bill, Representative Payson, stated the following to be the "fact in regard to the evil which this bill is intended to reach":

... [M]illions of acres of the public lands are held and fenced in by people who have no shadow of claim to an acre of them.

... [M]illions of acres of the public lands are fenced in with barbed-wire fences [and] American citizens when desiring to pre-empt or make homestead claims upon this land are run off with shotguns and rifles. It is to open this land up to sale and settlement that this bill is introduced. ... [T]he evil which is sought to be cured is that which prevents an American citizen from making a settlement upon the public lands, which he is prevented from doing for the reason that they are fenced in by foreigners.

Cong. Record, 48th Cong., 1st Sess. 4769 (June 3, 1884). Representative Henly noted that it was "these wire fences, which constitute the great evil this bill is addressed to. . . ." *Id.* Representative Rogers at one point declared that the "object of this bill is simply to break down and destroy fences which have been unlawfully or without authority of law established upon the public domain"; the Speaker of the House commented that the "chair so understands the bill." *Id.* at 4770; see also *id.* at 4771, 4772 (remarks of Representatives Rogers and Oates and of Speaker of the House).

After it was passed by the House, the bill went to the Senate Committee on Public Lands, which reported it favorably on January 12, 1885 with the following comments:

The necessity of additional legislation to protect the public domain because of illegal fencing is becoming every day more apparent. Without the least authority, and in open and bold defiance of the rights of the Government, large, and oftentimes

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Both the United States and this Court have in fact recognized that the Act effects no modification of the ordinary law of titles, even with respect to the odd-numbered sections within a checkerboard grant. In 1887, two years after the statute was enacted, the Secretary of the Interior requested legislation that would provide for construction of roads over privately owned checkerboard lands for access to the interlocked public lands, and recognized that any such legislation would have to provide for payment of compensation to affected property owners to satisfy constitutional requirements. See p. 15, *supra*. In *Camfield v. United States*, 167 U.S. 518, 527-28 (1897), the Court held that the owner of the odd-numbered checkerboard sections would "doubtless" have the right to fence in each section separately, because "[s]o long as the individual proprietor confines his enclosure to his own land, the Government has no right to complain, since he is entitled to the *complete and exclusive enjoyment of it, regardless of any detriment to his neighbor*"; it was only when, the Court held, "under the guise of enclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to enclose the lands of the Government, he is plainly within the statute,

foreign corporations deliberately inclose by fences areas of hundreds of thousands of acres, closing the avenues of travel and preventing the occupancy by those seeking homes. While those fencing allege the lands within such inclosures are open to settlement, yet no humble settler, with scarcely the means for the necessities of life, would presume to enter any such inclosure to seek a home.

. . . [T]hose appropriating vast areas are hoping the only remedy to be used against them will be the law's delay in the courts.

Therefore your committee have added a new section to the Army bill, authorizing the President of the United States to summarily remove all obstructions, and, if necessary, to use the military power of the United States.

S. Rep. No. 979, 48th Cong., 2d Sess. 1 (1885). As modified by the Senate, the bill was quickly passed and became law on February 23, 1885. 23 Stat. 321.

and is guilty of an unwarrantable appropriation of that which belongs to the public at large." (Emphasis added.)¹⁰

There simply is no support in the language or history of the Unlawful Inclosures Act for the conclusion of the court below that the Act recognized pre-existing federal rights of way over petitioners' lands, or any basis for the conclusion of the Court of Appeals that the decisions in *Camfield v. United States*, *supra*, and *Buford v. Houtz*, 133 U.S. 320 (1890), constituted judicial recognition of such rights. Both cases involved actions by owners of checkerboard land intended to effect appropriation of public lands; neither decision qualifies the language of grant in the Union Pacific Act or provides any basis for implying rights of way for new public uses across patented lands.

In *Camfield*, the United States brought an action under Section 2 of the Unlawful Inclosures Act, 43 U.S.C. § 1062, to compel the removal of fences erected on privately owned checkerboard lands that were constructed in such a manner as to enclose about 20,000 acres of public lands in two townships. The fences were constructed at the section lines on the odd-numbered sections owned by defendants along the borders of the townships in such manner as to enclose the townships in their entirety and

¹⁰The Court added that it thought this "scarcely a practical question," since separate enclosure of each section would only become desirable "when the country had been settled, and roads had been built which would give access to each section." 167 U.S. at 528. Thus, 35 years after the grant to the Union Pacific, the Court thought that access to the retained lands was not yet a practical problem, in light of the vastness of the West and the scarcity of its population. In such circumstances, it is difficult to comprehend how a Congress sitting in 1862 could have been concerned about the question, let alone to have made it the "dominant intent" of the railroad grant legislation as the Tenth Circuit and respondent would have it.

thereby appropriate the even-numbered public sections therein.²⁰ By analogizing to state police power permitting the prevention of activity on private property that was offensive or injurious to neighboring property owners, the Court held that the United States, as a landowner, could abate the nuisance created by defendants on their lands which had the purpose and effect of appropriating to exclusive use the property of the United States. 167 U.S. at 522-25. Cf. *United States v. Alford*, 274 U.S. 264, 276 (1927). But in allowing police power type of protection on public lands, the Court in *Camfield* was careful to make clear that it was not recognizing the existence of any public property rights in private lands. See pp. 36-37, *supra*.

In *Buford*, the Court held that owners of unfenced checkerboard land in Utah had properly been denied an injunction against the large-scale trailing and grazing of sheep across their lands, on the ground that the Court would not assist the plaintiff-cattlemen in monopolizing the public domain by in effect ordering defendants to cease using the public lands if they could not keep their flocks from grazing on plaintiffs' lands. *Buford* was, in reality, only a fencing case, concerned solely with the issue whether the owner of unfenced land contiguous to public grazing land could limit grazing on the public lands because of the propensity of the animals to cross and graze on the private land. It did not determine that a public right of passage existed across the private land and did not limit the right of the private landowner to fence his land and exclude public grazing thereon or the crossing thereof. The Court in fact noted that Utah,

²⁰A diagram of defendants' fencing is included in the Court's opinion in *Camfield* at 167 U.S. at 520.

in common with other states, had adopted a "fence law" which required a landowner to fence his land in order to keep out livestock grazing at large and that a decision for plaintiffs would in effect have amounted to an adoption by judicial fiat of the common law rule that required the owner of livestock to keep his animals confined. Had the Court in *Buford* meant anything more by its decision, it could have, and certainly would have, disposed of the entire controversy by holding directly that the public had a right of way for moving animals across the private land; that it did not is a clear acknowledgement of its respect for the unfettered quality of the private grant.²¹ Indeed, in *Lazarus v. Phelps*, 152 U.S. 81 (1894), the Court subsequently held that state fence laws did *not* authorize livestock owners deliberately to use or take possession of unfenced privately owned lands without making compensation to the owners of such lands. See *Light v. United States*, 220 U.S. 523, 537 (1911); *Cosgriff v. Miller* 10 Wyo. 190, 222-24, 68 P. 206, 211-12 (1902).

Accordingly, legislation and decisions proscribing unlawful appropriation of the public domain are wholly irrelevant to any issue in this case. Petitioners have not violated the Unlawful Inclosures Act by the mere ownership of their lands, and they have not fenced the public domain. Pet. App. ii. If petitioners obstruct free passage over the public lands, the United States should pursue the civil and criminal remedies provided by the Act, not seize private lands for public use without just compensation.

²¹As in *Camfield*, by approving the Utah fence legislation, the Court in effect recognized that a landowner could fence or otherwise make legitimate use of his own land even to the detriment of those seeking to utilize the public domain.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the judgment of the Court of Appeals be reversed and that the judgment of the District Court quieting petitioners' titles against the United States be affirmed.

Respectfully submitted,

CLYDE O. MARTZ

HOWARD L. BOIGON

DAVIS, GRAHAM AND STUBBS

JOHN A. MACPHERSON

T. MICHAEL GOLDEN

MACPHERSON, GOLDEN AND BROWN

Attorneys for Petitioners